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Move-Away Custody Disputes: The Implications of Case-by-Case Analysis & the Need for Legislation

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MOVE-AWAY CUSTODY DISPUTES: THE IMPLICATIONS OF CASE-BY-CASE ANALYSIS & THE NEED FOR LEGISLATION

Jen has physical custody of her two young children. She was a homemaker during her former marriage and now wishes to attend a university so she may begin a career. Her mother will watch the children if Jen returns to school in Illinois. Jen believes the transition will be positive because her children will be raised in the presence of her family. Her ex-husband, however, wants to be able to visit his children. He is seeking a modification of the existing custody order to transfer physical custody of the children to him, or to force Jen to remain in California.

Laura lives in San Francisco with her ten-year-old son and has a career in business. Laura and her ex-husband, Dan, were married for twelve years. Laura has been offered a promotion in Los Angeles. The new job will advance Laura in her career and increase her salary significantly. The higher income will enable her to place her son in a private school and begin a savings account for his college education. Dan does not want Laura to relocate because he does not have the time nor money to travel regularly to Los Angeles to visit his son. Dan has requested a modification of the initial custody decree to have his son placed in his physical custody.

How should the court rule in these situations? There is no predictable answer for either scenario.

I. INTRODUCTION

The problem of post-divorce relocation disputes, known as "move-away" cases in family law parlance, has become a pressing and important issue in the United States.[1] The prevalence of move-away disputes stems from a variety of sources. First, as increasing numbers of women enter the labor force,[2] the equation of women and work has become a so-

1. *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182 (Ct. App. 1992).

2. For the time period of 1983 to 1991, the increase in the proportion of women working full-time is statistically significant. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 412 (1992).

cial norm. The increase of women in the work force results from both single and divorced women[3] needing employment for financial sustenance, as well as their wish to follow career goals. Often, women place great emphasis on their employment and must relocate to find work or to promote their education and careers.[4]

The problem of relocation instigated by the need to obtain employment is not unique to women. According to the California Court of Appeal:

> In these days of each parent pursuing a career, advancement up the career ladder may require a parent to move to a different community or, indeed, to a different part of the country. . . . Such a parent must give serious consideration to moves which are best for career advancement, since careers continue long past the minority of children and are important for the financial and psychological well-being of the parent.[5]

This statement suggests that social conditions often force both men and women to relocate in order to find employment that will permit them to support both themselves and their children at an acceptable standard of living.

Second, economic needs and incentives frequently make employment a top priority for both men and women. Relocation may be necessary in order to take advantage of job opportunities in distant locations,[6] or to pursue economic stability through residence in areas with lower housing costs. Thus, it is becoming more common for custodial parents to plan to relocate with their children to an area that is no longer within the same jurisdiction as the noncustodial parent.[7] This situation is especially true because technology has made travel, and thus relocation, a much easier endeavor than it

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3. Research results have indicated that "75% of custodial mothers move at least once within four years after separation or divorce." DAVID ROBERTI, SENATE COMMITTEE ON JUDICIARY, REPORT ON FAMILY LAW: RELOCATION OF CUSTODIAL PARENTS at 4 (1994) (on file with author).

4. *See infra* note 6.

5. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 259 (Ct. App. 1986).

6. "Since 1985 nearly half of all households in the U.S. have moved. Each year, 11.5 million children between the ages of 1 and 17 change residences. Corporate transfers send over half a million children into new homes." ROBERTI, *supra* note 3, at 4.

7. *See generally* Peter T. Surace, Note, *A Proposed "Best Interests" Test for Removing a Child from the Jurisdiction of the Noncustodial Parent*, 51 FORDHAM L. REVIEW 489, 495-501 (1982).

was in the past. As a result, move-away custody cases represent an important and pervasive problem in the area of family law.

Typically, in move-away cases the original custody order gives physical custody to one parent,[8] referred to as the "custodial" parent, while the other parent is granted visitation rights.[9] In a move-away situation, at some point following marital dissolution, the parent with physical custody wishes to relocate either to a different county or state. The noncustodial parent will usually contest the proposed modification, arguing that such a relocation is inequitable and will frustrate or completely prevent the noncustodial parent from exercising his visitation rights.[10]

To resolve such disputes, the court must address the dilemma of competing parental needs and interests, while viewing the best interests of the child[11] as the paramount concern. In essence, the trial court judge must determine which parent's relationship with the child is to receive priority and be designated the custodial relationship.

Currently, the court has no standard or legislative guidelines for addressing the competing interests and factors inherent in move-away custody cases. Judges must resolve such custody disputes on a case-by-case basis.[12] Resolving move-away custody disputes using case-by-case analysis is a challenging judicial endeavor because there are three considerations in a move-away situation: the child, the custodial

8. Although the California Family Code has no gender preference as to which parent should receive primary custody of the child, the mother is predominantly granted physical custody, while the father is granted reasonable visitation rights. Furthermore, this is an arrangement to which the parents of a child often stipulate. Thus, for the purposes of this comment, the custodial, moving parent will be referred to as female and the noncustodial parent with visitation rights will be referred to as male. The author's choice of gender reference is not intended to be sexist in any way. *See generally In re* Marriage of Roe, 20 Cal. Rptr. 2d. 352, 353 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 842 (Ct. App. 1991); *In re* Marriage of Fingert, 271 Cal. Rptr. 389, 390 (Ct. App. 1990); *Rosson*, 224 Cal. Rptr. at 254; *In re* Marriage of Murga, 163 Cal. Rptr. 79, 79 (Ct. App. 1980); *In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 262 (Ct. App. 1976).

9. *See generally* cases cited *supra* note 8.

10. *See* discussion *infra* part II.C.4.

11. CAL. FAM. CODE § 3040 (West 1994).

12. *See* discussion *infra* part II.B.2.

move-away parent, and the remaining noncustodial parent all have competing interests and needs.[13] Therefore, the primary issue posed by the three competing interests is as follows: How can and should a family law judge resolve a dilemma that pits the child's best interests against concerns of parental and personal autonomy?

Although a case-by-case approach enables judges to consider the facts and circumstances of each situation, the flexibility of this approach is not without serious disadvantages. Without legislative standards or an explicit framework to follow, the judge resolving a move-away custody dispute is vested with essentially unbridled discretion.[14] The "best-interests-of-the-child"[15] standard fails to provide judges with effective guidelines that guarantee objective decisions. Thus, judges can use virtually any factors to decide move-away custody cases, including personal evaluations and subjective preferences.[16] As a result, judicial decisions in move-away custody cases lack uniformity and predictability.

Because explicit guidelines do not exist to aid judges in the resolution of move-away custody disputes, it is apparent that they have relied upon developing trends and case law. A historical overview of the treatment of these disputes is helpful in tracing such informal trends and identifying the foundation of current public policy goals.

The reader should note, however, that while trends may provide rudimentary guidelines for judges to solve move-away custody disputes, current standards remain inadequate due to their lack of uniformity and unpredictability. As such, these informal trends and preliminary guidelines require transformation into explicit, legislative guidelines. This comment's primary focus is to propose legislative guidelines to fill the existing gaps, thereby lending uniformity and consistency to the determination of move-away custody disputes.

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13. *See generally* Surace, *supra* note 7, at 496; Janet Bulow & Steven G. Gellman, Note, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 STAN. L. REV. 949, 950-54 (1982). *See also* discussion *infra* part II.B.2.

14. CAL. FAM. CODE § 3040(b) (West 1994).

15. *Id.* § 3011. *See infra* notes 50-55 and accompanying text.

16. In Speelman v. Super. Ct., 199 Cal. Rptr. 784 (Ct. App. 1983), the trial court judge maintained: " 'Frankly, I'm not too much in favor of a military upbringing for a child and-of this age. . . . I think that—he has a better opportunity here in California than he has in—than he had in Massachusetts at the moment.' " *Id.* at 786 (alteration in original).

In Section II, this comment traces the development of informal trends that emerged from the 1950's onward which serve as rudimentary guidelines in the resolution of move-away custody cases.[17] In addition, current goals and public policy principles of family law,[18] as well as critical factors that aid in the determination of such disputes,[19] will be examined and analyzed in Section II. Section II will also address constitutional issues that surface when requested modification of custody orders is denied thereby restricting relocation.[20] Section III addresses the need for a legislative approach for solving these disputes as they become increasingly common and complex.[21] Finally, Section IV proposes a flexible framework of rules to serve as a legislative scheme to assist in more consistent and efficient judicial resolution of move-away custody cases.[22]

II. BACKGROUND

A. *Historical Overview of the Treatment of Move-Away Custody Cases*

1. *Tender Years Doctrine*

Prior to the enactment of California Family Code section 3040(a)(1), which mandates that California courts "shall not prefer a parent as custodian because of that parent's sex,"[23] the court followed a policy referred to as the "tender years" doctrine in awarding custody.[24] In general, this doctrine established a presumption that children of "tender years" be placed under the primary custody of the mother.[25] The application of this doctrine is exemplified in *White v. White*,[26] in which the California Court of Appeal complied with California Civil Code section 138(2), now repealed, which read in part as follows:

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17. *See infra* text accompanying notes 74-248.
18. *See infra* text accompanying notes 51-74.
19. *See infra* text accompanying notes 54-235.
20. *See infra* text accompanying notes 237-54.
21. *See infra* text accompanying notes 255-80.
22. *See infra* text accompanying notes 281-90. *See also infra* note 275.
23. CAL. FAM. CODE § 3040(a)(1) (West 1994).
24. White v. White, 240 P.2d 1015, 1015 (Cal. Ct. App. 1952).
25. *Id.*
26. 240 P.2d 1015 (Cal. Ct. App. 1952).

> As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.[27]

Thus, in the past, custody decisions were more simplistic because the award of custody was based upon the age of the child. The court did not have to analyze and evaluate factors regarding the nature and quality of the relationship between the child and each parent.

Consequently, once the court made a determination that a child should be placed in the primary custody of the mother, it was easier for the court to allow custodial mothers to relocate, even out of state.[28] This apparent ease[29] in allowing relocation as a general rule also stemmed from the fact that parenting was not considered a joint endeavor as it is today;[30] it was traditionally viewed as primarily the mother's responsibility. Thus, deference was often given to the mother's concerns because she was the primary caretaker.[31]

2. *Judicial Limitations on Granting Modifications in Move-Away Custody Cases*

Although courts appeared to take a lenient stance in permitting relocation, they did set limitations on the custodial parent's ability to change residences. The right to relocate was not considered to be absolute, but instead based on the circumstances of each case. For instance, in *Clarke v. Clarke*,[32] the court asserted that "the welfare of the child and not the shortcomings of the respective parties . . . [was] determinative."[33] Similarly, in *Shea v. Shea*,[34] the court stated

27. *Id.* at 1015. *See also* Clarke v. Clarke, 217 P.2d 401, 402 (Cal. 1950); Stack v. Stack, 11 Cal. Rptr. 177, 183 (Ct. App. 1961).

28. *See Stack*, 11 Cal. Rptr. at 184.

29. The court's general ease in allowing the mother to change her residence and granting the accompanying modification in the custody order is demonstrated in *Stack* where the court held that, as a general rule, California courts retain the power to permit a custodial parent to remove the child from the state of jurisdiction to either a sister state, or to a foreign country. *Id.*

30. *See infra* text accompanying notes 61-65.

31. *See generally Clarke*, 217 P.2d 401, 402; *Stack*, 11 Cal. Rptr. 177, 183.

32. 217 P.2d 401 (Cal. 1950).

33. *Id.* at 402.

34. 223 P.2d 32 (Cal. Ct. App. 1950).

that "a court, in the absence of a finding that the child's removal would prejudice its rights or welfare,[35] has no power to prohibit the parent having custody from taking the child out of a particular county."[36] Thus, a court would not permit relocation if it anticipated that the move would prejudice the child or that relocation was not in the child's best interests. As with current family law principles, the child's interests and welfare superseded the interests and needs of the parent.

The court also required the desired move to be in good faith; it could not be for the purpose of frustrating the noncustodial parent's visitation rights.[37] The court in *Evans v. Evans*[38] held that removing a child from the state of residence and establishing a new home elsewhere was not considered "wrongful conduct"[39] if "frustration of the other parent's visitation rights was not the specific intent of the removal."[40] Therefore, as long as the move-away parent did not desire the residential relocation for the purpose of intentionally keeping the noncustodial parent at a distance, it appears that the courts tended to be lenient in granting requested custody modifications when the custodial parent wished to move. If the ultimate outcome of the move functioned to frustrate or interfere with the noncustodial parent's visitation rights, this in itself was not sufficient to prevent the desired move, where the interference was not intended.[41]

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35. In Dozier v. Dozier, 334 P.2d 957 (Cal. Ct. App. 1959), the court refused to permit the mother to move from California to Connecticut to be near her family and to obtain employment. *Id.* at 957. The court denied the move claiming it would endanger the 8-year-old boy's health (he was "susceptible to bronchial pneumonia or infection and asthmatic attacks"), and because the evidence failed to show any "real financial, employment, educational, health, or housing consideration" behind the proposed move. *Id.* at 960-61. The trial court, however, retained jurisdiction of custody, contending that "when the boy is older, stronger, and better able to withstand the eastern climate, if circumstances arise justifying the move, the court may, on proper application, permit his removal." *Id.* at 962.

36. *Shea*, 223 P.2d at 33.

37. In Gudelj v. Gudelj, 259 P.2d 656 (Cal. 1953), the California Supreme Court denied the custodial mother permission to remove her minor son from the county because she threatened to remove the boy from the state and change his name, thus defeating the father's visitation rights. *Id.* at 660.

38. 8 Cal. Rptr. 412 (Ct. App. 1960).

39. *Id.* at 416.

40. *Id.*

41. One California court stated that "[t]he mere fact that [the] plaintiff may thus be deprived of reasonable visitation rights is not necessarily determinative; again, the welfare of the child is the controlling consideration." Foley v.

Thus, prior to the statutory changes in California Family Code section 3020[42] which were implemented to set aside the tender years doctrine, the move-away parent could not relocate if doing so would be detrimental to the child, or if the purpose of the move was to interfere with the noncustodial parent's continuing contact with the child. Moreover, if the proposed move was "unrelated to the child's welfare" and, therefore, not in good faith, the court typically would refuse to modify the custody order to permit the move.[43]

3. *Change of Circumstances Requirement*

Before the original custody order would be modified to permit the proposed relocation, the court typically required that the move-away parent show a "change of circumstances."[44] According to the court in *Gantner v. Gantner*,[45] "[t]he rule is . . . that to justify a modification there must be a change of circumstances arising after the original decree is entered . . . ."[46] The change of circumstances standard is still in effect. The purpose of this "judge made" rule was, and still is, to "protect the court, the parties and the child from interminable and vexatious litigation."[47]

Consistent with modern family law principles,[48] the burden of proving a change of circumstances was upon the parent who desired the custody modification.[49] The moving party had to show that the welfare of the child required a

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Foley, 29 Cal. Rptr. 857, 861 (Ct. App. 1963). Furthermore, in Milne v. Goldstein, 15 Cal. Rptr. 243 (Ct. App. 1961), the court reasoned that:

> [t]he fact that the resident parent may be deprived of visitation rights is generally not alone sufficient to justify restraint on the other parent's free movement. . . . But if the specific motive is the frustration of the other parent's visitation rights and is unrelated to the child's welfare, permission to remove will be denied.

Id. at 245.

42. CAL. FAM. CODE § 3020 (West 1994).

43. *Milne*, 15 Cal. Rptr. at 245.

44. Gantner v. Gantner, 246 P.2d 923, 927 (Cal. 1952).

45. *Id.*

46. *Id. See also* Forslund v. Forslund, 37 Cal. Rptr. 489, 499 (Ct. App. 1964).

47. Stack v. Stack, 11 Cal. Rptr. 177, 186 (Ct. App. 1961).

48. *See* discussion *infra* part II.B.1.b.

49. *Forslund*, 37 Cal. Rptr. at 505.

change of custody, or that the circumstances and conditions changed so as to justify such change.[50]

B. *Current Treatment of Move-Away Cases*

1. *Overview of Current Public Policy and Legislation in the Family Law Context*

Many of the policy considerations evident throughout the historical development of the treatment of move-away custody cases persist today. First and foremost, the court's primary goal is to support a course of action that will promote the "best interests" of the child or children involved in a dispute.[51] Although the court may consider the interests and needs of the parents involved, the court's ultimate custody determination must be based on the best interests of the child.[52] California Family Code section 3040 sets forth: "Custody should be awarded . . . according to the *best interests of the child* . . . ."[53] Section 3011 further explains this principle: "In making a determination of the best interest of the child . . . the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety, and welfare of the child."[54]

This primary focus on the child often results in the exclusion of parental interests and needs from consideration.[55] The desires and needs of the parents are secondary to those of

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50. *Id.* In Evans v. Evans, 8 Cal. Rptr. 412 (Ct. App. 1960), the court required only that the move-away parents have an "ample reason" for the removal of the children. *Id.* at 416. In contrast, the court in Dozier v. Dozier, 334 P.2d 957 (Cal. Ct. App. 1959), was stricter in its required showing and maintained that the move-away parent must have a "compelling reason" for the proposed residential relocation. *Id.* at 961. In *Dozier*, the judge would not permit the proposed relocation because the mother's desire to be near her relatives was not a sufficiently compelling reason to permit the modification. *Id.* at 958. In contrast, in *Evans* the court was more lenient. The judge was satisfied that the mother presented an "ample reason" for the desired move, namely, that she was making a "bona fide" attempt to raise her children in a normal family environment. *Evans*, 8 Cal. Rptr. at 416.

51. CAL. FAM. CODE § 3040 (West 1994).

52. "The *paramount consideration* in determining the custody of a minor child is the welfare and best interest of the child." Bartold v. Bartold, 318 P.2d 69, 70 (Cal. Ct. App. 1957) (emphasis added) (citation omitted). *See also* 67A C.J.S. *Parent & Child* § 20 (1978 & Supp. 1993).

53. CAL. FAM. CODE § 3040(a) (West 1994) (emphasis added).

54. *Id.* § 3011(a). Note the wide latitude of discretion given in this section exemplified in the language "among any other factors it finds relevant."

55. *See infra* note 89 and accompanying text.

the child, and because the best interests of the child remains the controlling influence in any custody determination, "the feelings and desires of the parents are not to be considered, except insofar as they affect the best interests of the child."[56]

Furthermore, family court custody orders also aim to foster and preserve "frequent and continuing contact" between the child and both parents and to make child rearing a joint endeavor.[57] California Family Code section 3020 sets forth:

> The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where that contact would not be in the best interests of the child . . . .[58]

In summary, these code sections identify the overriding concerns inherent in family law: to make a custody determination that is in the best interests of the child, while promoting frequent and continuing contact with both parents and active involvement by both parents in child raising.

a. *Change in Policy: "Tender Years" Doctrine Overruled*

Pursuant to California Family Code section 3040(1), in making an order for custody to either parent, the court "shall not prefer a parent as custodian because of that parent's sex."[59] In essence, this gender-neutral provision completely

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56. 33 CAL. JUR. 3D *Family Law* § 914 (1994). However, an agreement or custody stipulation between the parents should be considered by the courts if it appears "reasonable." *Id.*

57. CAL. FAM. CODE § 3020 (West 1994).

58. *Id.* To further facilitate the public policy goal of "frequent and continuing contact" with both parents, there is a statutory presumption affecting the burden of proof that joint custody is in the best interests of the child. *Id.* § 3080. However, this presumption only applies when both parents agree to joint custody. *Id.* When there is no agreement among the parents to follow a joint custody arrangement, California law establishes no preference or presumption in disputes regarding joint or sole custody. *Id.* §§ 3040(a)(1), (b).

59. *Id.* § 3040(a)(1). Notwithstanding California Family Code section 3040(a)(1), which prohibits the preference of a parent based on that parent's sex, the mother is still frequently found to be the most appropriate parent. *See generally* cases cited *supra* note 8. It is possible that sole custody is still overwhelmingly awarded to the mother of the child because public policy notions behind the tender years doctrine still prevail in current family law custody de-

overrules the former "tender years" doctrine.[60] This change in policy is critical, because the court currently has to weigh and balance the facts and circumstances of each case instead of simply making the determination based upon the child's age.

Hence, current public policy abandons the former statutory presumption that the mother is automatically the better parent if the child is of tender years. In addition, it advances the notion that child rearing is a joint endeavor, requiring input and assumption of responsibility by both parents. In furtherance of this policy, California Family Code section 3080 mandates, "[t]here is a presumption, affecting the burden of proof, that *joint custody* is in the best interest of a minor child . . . ."[61] Similarly, California Family Code section 3040(1) states that the court will try to award custody "[t]o both parents *jointly*."[62]

The term "joint custody" does not necessarily mean that custody time is split equally between the parents. A common misconception is that "joint" custody constitutes equal sharing.[63] Joint custody merely means that one parent does not have *sole* custody of the child—in reality, joint custody encompasses a variety of arrangements. It is not uncommon for the parties to stipulate to, or for the trial court to grant to the parents, joint custody where one parent has primary custody for the majority of the child's time and the other parent receives minimal visitation rights.[64] The essential hallmark of

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terminations, despite the abolition of this doctrine and the implementation of California Family Code section 3040(a)(1).

60. *See* discussion *supra* part II.A.1.

61. CAL. FAM. CODE § 3080 (West 1994) (emphasis added).

62. *Id.* § 3040(a)(1) (emphasis added).

63. The court in *In re* Marriage of Birnbaum, 260 Cal. Rptr. 210 (Ct. App. 1989), acknowledged:

> It is doubtful that any two words mean as many different things to as many different people as the words "joint custody."
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> . . . .
>
> There seems to be a popular misconception that joint physical custody means the children spend exactly one-half their time with each parent . . . .
>
> . . . .
>
> Equal division of a child's time between the parents is not the hallmark of joint custody.

Id. at 214-15.

64. *See generally* cases cited *supra* note 8.

"joint custody" is that both parents share parenting responsibilities, often in separate homes.[65]

Despite the statutory preference for joint custody, the court will award any custody arrangement that will benefit the child. If one parent is awarded sole custody of the child, the general rule and goal of the court is to award reasonable visitation rights to the noncustodial parent.[66] If the parties cannot agree to a stipulated settlement that can be finalized in a custody order,[67] a determination of the best custody arrangement is a discretionary matter left up to the judge.[68]

California Family Code section 3040(b) grants the trial court judge a wide latitude of power and discretion in resolving custody disputes and in granting custody awards.[69] California Family Code section 3040(b) "establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the *widest discretion* to choose a parenting plan which is in the best interests of the child or children."[70] Such an exercise of discretion is not to be disturbed on appeal in the absence of a showing of abuse.[71] However, the judge must exercise his or her discretion in light of the important policy considerations previously discussed.[72]

b. *Required Showing for Modification of Existing Custody Order*

Once a custody award has been finalized in a court order, the order will typically be upheld in the interest of stability and consistency.[73] The court in *In re Marriage of McGinnis*[74]

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65. CAL. FAM. CODE § 3020 (West 1994).

66. California Family Code section 3100 sets forth, "the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child." *Id.* § 3100.

67. California Family Code section 3061 provides: "[T]he court shall, except in exceptional circumstances, enter an order granting temporary custody in accordance with the agreement or understanding, or in accordance with any stipulation of the parties." *Id.* § 3061.

68. *Id.* § 3040(b).

69. *See supra* text accompanying notes 12-16.

70. CAL. FAM. CODE § 3040(b) (West 1994) (emphasis added).

71. *In re* Marriage of Urband, 137 Cal. Rptr. 433, 434 (Ct. App. 1977); Foley v. Foley, 29 Cal. Rptr. 857, 861 (Ct. App. 1963).

72. *See also* 10 WITKIN, SUMMARY OF CALIFORNIA LAW, PARENT AND CHILD § 139 (1989 & Supp. 1993). *See* discussion *supra* part II.B.1.

73. *See infra* text accompanying notes 90-94.

74. 9 Cal. Rptr. 2d 182 (Ct. App. 1992).

stated this policy: "A change of custody is the exception, not the rule."[75] This policy attempts to ensure that custody modification is based upon legitimate needs so that such attempts will not create unnecessary complications.

Consistent with earlier cases, to modify the original custody order, the moving party must show a "substantial change of circumstances."[76] The California Supreme Court in *In re Marriage of Carney*[77] held that:

> It is settled that to justify ordering a change in custody there must generally be a persuasive showing of changed circumstances affecting the child. And that change must be substantial: a child will not be removed from the prior custody of one parent and given to the other "unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change."[78]

The burden of proving a substantial change of circumstances rests on the party desiring the modification.[79] To meet this required showing, a clear statement of reasons to justify the modification must be articulated.[80] The parent that wishes to relocate must file an order to show cause for modification of the original custody decree to have the move incorporated into the custody agreement, or the nonmoving party must file an order to show cause that the proposed move constitutes a substantial change in circumstances.[81] In the latter situation, the nonmoving party typically requests sole custody if the moving party carries out the proposed move.[82]

What is considered to be "substantial" is context-based and entirely dependent upon the facts and circumstances of

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75. *Id.* at 186.

76. *See also* Speelman v. Super. Ct., 199 Cal. Rptr. 784, 786 (Ct. App. 1983); *In re* Marriage of Murga, 163 Cal. Rptr. 79, 80 (Ct. App. 1980). *See also* 10 WITKIN, *supra* note 72, § 140. *See* discussion *supra* part II.A.3.

77. 598 P.2d 36 (Cal. 1979).

78. *Id.* at 38 (citations omitted).

79. *See supra* text accompanying notes 76-78.

80. *See Speelman*, 199 Cal. Rptr. at 788.

81. *See generally* CONTINUING EDUCATION OF THE BAR, PRACTICE UNDER THE CALIFORNIA FAMILY CODE, §§ 7.57-.58 (M. Dee Samuels et al. eds., 1994); Surace, *supra* note 7, at 498-99.

82. *See In re* Marriage of Fingert, 271 Cal. Rptr. 389, 390-91 (Ct. App. 1990); *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 254 (Ct. App. 1986). *See generally* Surace, *supra* note 7, at 498-99.

each case. Generally, this threshold showing is easily fulfilled because the proposed move itself usually constitutes a substantial change in circumstances.[83] If the proposed move is likely to interfere with the visitation rights of the noncustodial parent, this will typically be deemed a substantial change of circumstances[84] because such an interference is contrary to the public policy in favor of assuring minor children "frequent and continuing contact with both parents" following marital dissolution.[85] The court in *In re Marriage of Murga*[86] stated that "the decision of a noncustodial parent to establish residence in a place that is far enough away to preclude the exercise of existing visitation rights necessarily constitutes a changed circumstance sufficient to support" the modification of the visitation order.[87] However, the judge must keep in mind that the best interests of the child, not parental interests and needs,[88] remain the primary consideration.[89]

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83. In at least one case, however, the court held that there was not a sufficient showing of a substantial change in circumstances by virtue of the proposed move itself. In Speelman v. Super. Ct., 199 Cal. Rptr. 784 (Ct. App. 1983), the trial court denied a custody modification at the request of the mother because she failed even to attempt to show a change in circumstances that would warrant a modification in the custody order. *Id.* at 789. By holding that the moving party failed to meet her burden of proving that there had been a substantial change of circumstances since the original custody order, the court abstained from analyzing the proposed move. *Id.* Thus, it appears that the court in this particular case was stricter than can usually be expected and may be distinguished from other current move-away cases in that the court did not follow the trend of finding the change of circumstances requirement to have been met by the move itself. Generally, therefore, the court will find the threshold showing has been met, and will then focus on the move itself and whether it should be permitted within a modified custody order.

84. "Interference by a child's custodian with the visitation rights of the noncustodial parent constitutes a change of circumstances which may justify a change in custody." 10 WITKIN, *supra* note 72, § 146.

85. CAL. FAM. CODE § 3020 (West 1994). *See supra* text accompanying notes 57-58.

86. 163 Cal. Rptr. 79 (Ct. App. 1980).

87. *Id.* at 80.

88. *See supra* text accompanying notes 51-56.

89. The following explanation demonstrates how the child's welfare remains the paramount and controlling consideration, even if the substantial change of circumstances standard has been met:

> There is no fixed standard by which one may determine what constitutes such a substantial change of circumstances. The court is guided only by the rule of very general application that the welfare and best interests of the child are the primary concern in determining whether the order shall be changed; and even though there has been a substan-

The public policy behind the change in circumstances requirement for custody modification is to promote the "dual goals of judicial economy and protecting stable custody arrangements."[90] The change of circumstances rule is designed to prevent repetitive and unnecessary litigation arising from minor changes in the custodial parent's life. In the interest of stability, the court wishes to discourage litigation in custody disputes by preserving established modes of custody.[91] Consequently, the change of circumstances requirement functions to keep trivial or less significant issues out of the court system by establishing a standard that must be met before the court will reexamine a particular custodial arrangement.[92]

In addition, California public policy is designed to preserve and protect stable custody arrangements. The court in *In re Marriage of Burchard*[93] maintained that "[t]he child's need for and right to stability and continuity have been widely recognized."[94] Common sense dictates that it would be detrimental and emotionally disruptive to uproot a child from living arrangements she or he is accustomed to unless the change is absolutely vital.

Once this threshold requirement had been met, the trial court's focus turns to the move itself: the alleged reasons behind the desired relocation, its speculated consequences, the

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tial change of circumstances the court should not modify the order unless the welfare of the child will be promoted thereby. In other words, the substantiality of the change of circumstances is tested with respect to the child's welfare *rather than the parents' welfare.*

24 AM. JUR. 2D *Divorce & Separation* § 1011 (1983 & Supp. 1993) (emphasis added).

90. Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986). The court in *Burchard* maintained:

> The changed-circumstance rule is not a different test . . . but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest.

Id.

91. *Id.* at 488.

92. *Id.*

93. 724 P.2d 486 (Cal. 1986).

94. *Id.* at 491 n.6.

best interests of the child, how the proposed move will affect the child's welfare, and other relevant issues and concerns.[95]

c. *General Rule for Move-Away Disputes*

As a general rule, current statutory law suggests that residential changes should be permitted, as long as they are in the child's best interests and the child's welfare or rights are not jeopardized.[96] California Family Code section 7501 provides: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."[97] The language stating "subject to the power of the court," grants the trial court judge wide discretion in the decision as to whether the custodial parent should be allowed to relocate to another county or out of state.[98]

However, current case law reveals that the rule governing move-away custody cases is not as general, nor as lenient, as suggested in California Family Code section 7501.[99] More specifically, as exemplified in recent cases, the reasons for and circumstances surrounding the move are subject to stricter scrutiny. A wide variety of factors must be taken into

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95. *See* discussion *infra* part II.B.2.

96. *See* 33 CAL. JUR. 3D *Family Law* § 938 (1994); 4 GODDARD, CAL. PRAC. *Family Law Practice* § 196 (1981 & Supp. 1992).

97. CAL. FAM. CODE § 7501 (West 1994). Incidentally, this code section is scarcely cited, if cited at all, in move-away custody cases. This lack of usage indicates the move-away dilemma is not as easily resolved as section 7501 might suggest. *But see infra* note 275. Senate Bill 1350 "restates and modernizes the language in Section 7501 of the California Family Code that has been the law since 1872." Legal Fact Sheet for Senate Bill 1350 from the Senate Committee on Health and Human Services (1994) (on file with author).

98. The following description of the trial court's discretion reflects the wide latitude such discretionary power entails:

> The trial court in child custody matters is given a wide discretion as to removal of children from the jurisdiction. A court may permit a parent who has custody of a child to remove the child from the state, either to a sister state or to a foreign country. On the other hand, the court has the power to prohibit removal of the child from the jurisdiction, and even to impose restrictions on its removal from a specified county within the state.

33 CAL. JUR. 3D *Family Law* § 938 (citations omitted) (1994).

99. *See supra* note 97.

consideration, and the move must be essential, beneficial, and imperative.[100]

In contrast, the standard in California Family Code section 7501 seems more lenient in that it focuses on the possible negative implications of the proposed move. Rather than concentrating on the anticipated benefits of the move and requiring that the move promote the child's best interests as is currently required, the drafters of California Family Code section 7501 apparently intended to restrict relocation only if it would harm the child. Thus, while California Family Code section 7501 requires the move not be permitted if it *harms* the child, current case law suggests the move not be permitted if it does not *benefit* the child. The latter is a more difficult showing to make.

Focusing on current case law in order to identify the ways in which this standard is challenging to meet, it appears that the desired relocation must be in the child's best interests and promote the child's welfare.[101] This indicates that a mere change in circumstances is not sufficient to meet the required showing. In addition to fulfilling the requirement of showing a substantial change in circumstances, the moving party must also show that the proposed modification would benefit the child.[102] This standard of proof is very strict and fact-dependent. Therefore, because the factors of each case are critical in arriving at an end result, the outcome of a move-away custody dispute is often unpredictable.

2. *Case-by-Case Analysis of the Competing Needs & Interests of the Parties*

Because no legislation currently exists to identify the particular factors a judge should consider, or to guide a judge in making such determinations in light of available facts, each case that comes before the court must be decided on a case-by-case basis. In ascertaining whether a proposed relo-

100. *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 186 (Ct. App. 1992); *see also* Burchard v. Garay, 724 P.2d 486, 489 (Cal. 1986); *In re* Marriage of Carney, 598 P.2d 36, 38 (Cal. 1979); Speelman v. Super. Ct., 199 Cal. Rptr. 784, 786 (Ct. App. 1983).

101. *See Burchard*, 724 P.2d at 489. The court in *Burchard* agreed with appellant's assertion that the parent filing for the modification "should have the burden of persuading the court that a change in custody is *essential* or *expedient* for the welfare of the child." *Id.* (emphasis added).

102. *McGinnis*, 9 Cal. Rptr. 2d at 186; *Speelman*, 199 Cal. Rptr. at 786.

cation should be allowed, the trial court weighs and balances a wide variety of facts and issues in each situation, thereby arriving at an individualized result.

Due to the lack of legislative to guidelines, judges must look to the particular circumstances, parties, and reasons offered for a proposed move. When evaluating the custodial parent's reasons for relocation, the court must anticipate how the move will affect the child's welfare,[103] the manner in which the move will affect the noncustodial parent, and the consequences if the existing custody order is not modified to permit the desired move. In essence, the court must speculate as to the consequences of a denial of the requested custody modification, as well as the consequences that might result if the modification is granted allowing relocation.

This case-by-case analysis entails a detailed examination of three competing considerations: the child, the custodial move-away parent, and the remaining noncustodial parent.[104] Focusing first on the *custodial parent* desiring relocation, this parent typically has a variety of general interests and specific reasons for the proposed move.[105] In general, the custodial parent has an interest in personal autonomy, which is intrinsically linked to the capacity to relocate and travel freely. Moreover, parental autonomy, or the ability to control the upbringing of the child—which is commonly associated with being a primary caretaker of a child—is typically equated with the freedom to decide where the child is raised.

Specific reasons the custodial parent may use to justify the desired relocation include a desire to move to seek out or accept an employment opportunity,[106] to enable a new spouse to accept a job offer,[107] to improve or continue her education,[108] to be close to family and relatives,[109] or to find less

103. CAL. FAM. CODE § 3040 (West 1994).

104. *See supra* note 13.

105. *See infra* text accompanying notes 103-09. *See also supra* text accompanying notes 2-7.

106. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 254 (Ct. App. 1986).

107. *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 353 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 184 (Ct. App. 1992).

108. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 842 (Ct. App. 1991).

109. *Id.*; Dozier v. Dozier, 334 P.2d 957, 959 (Cal. Ct. App. 1959).

expensive or more suitable housing.[110] The custodial parent may also desire to relocate with the hope of starting anew after the divorce[111] or to avoid the ex-spouse.[112] In addition, the custodial parent may seek to relocate in order to provide her child with a better education, more recreational or extracurricular opportunities, an expanded peer group that includes members of the family,[113] or for health-related reasons.[114]

In competition with the interests and needs of the custodial parent, the *noncustodial parent* will likely attempt to prevent the relocation in order to protect his visitation rights. Visitation rights are often infringed upon when the custodial parent relocates, because the increase in distance typically augments travel costs, detracts from time available to spend with the child, and makes visitation more inconvenient overall.[115] The remaining parent may also oppose the move because it represents a loss of control over the child's upbringing and may jeopardize existing emotional ties with the child.

Finally, yet of utmost importance, the *child's* feelings and interests regarding the move must be taken into consideration. In essence, for an existing custody order to be modified to permit relocation, the move must be in the best interests of the child, regardless of the strength of the custodial

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110. *Dozier*, 334 P.2d at 962.

111. The custodial parent:

> [M]ay view the move as therapeutic, helping her to recover from the trauma of the divorce and preparing her for life apart from her ex-spouse. She may also be attempting to establish her authority as head of the new family unit created after the divorce to demonstrate her independence from her ex-spouse.

Bulow & Gellman, *supra* note 13, at 951 (footnote omitted).

112. *In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 262 (Ct. App. 1976).

113. *Dozier*, 334 P.2d at 959.

114. Evans v. Evans, 8 Cal. Rptr. 412, 416 (Ct. App. 1960).

115. The noncustodial parent is typically opposed to the proposed move because of its probable resulting impairment of visitation rights. The noncustodial parent:

> [M]ay be interested in being able to see the child frequently for several reasons: he may simply enjoy spending time with the child; he may believe that his presence and companionship will make a positive contribution to the child's development; or he may have hopes of developing a good relationship with the child in the future as the child matures and the trauma of divorce fades.

Bulow & Gellman, *supra* note 13, at 952.

parent's interests in the proposed move.[116] Thus, the "child's best interests," a principle encompassing the child's safety, health and welfare, remains the court's primary consideration.[117]

Consequently, the court will determine whether visitation will be feasible in terms of time, distance, and travel expenses after relocation takes place. The court also considers factors such as the child's age and residential preference,[118] as well as the degree of the child's attachment to the school system,[119] extracurricular activities and his or her peer group.[120] In doing so, the court will speculate as to how the move will affect the quality of the child's education and overall welfare. In addition, the court will consider how the anticipated advantages of relocation, such as better employment opportunities and therefore a higher income for the custodial parent and more suitable housing, will in turn enhance the material well-being and standard of living of the child.[121]

3. *Factors Outside the Scope of Judicial Consideration*

Although the trial court judge has wide discretion[122] in considering numerous factors when making custody determinations and granting modifications, a few factors are not within the judge's discretion to consider as determinative elements. Thus, in the analysis of which parent is the "better" parent for custody purposes, or in evaluating the alleged benefits and circumstances surrounding a proposed relocation, judicial discretion is restricted by important policy considerations.

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116. Often, with its primary focus on the child, the best interests of the child standard results in the exclusion of the parents' interests as a significant concern. *Id.* at 965-66. *See supra* note 89.

117. "In making a determination of the best interest of the child in any proceeding . . . the court shall, among any other factors it finds relevant, consider . . . [t]he health, safety, and welfare of the child." CAL. FAM. CODE § 3011(a) (West 1994). *See supra* text accompanying notes 51-53.

118. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 251-52 (Ct. App. 1986). However, in order for the judge to consider the child's preferences, the child must be mature enough to articulate a legitimate and honest desire. *Id.* at 256.

119. *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 186 (Ct. App. 1992).

120. *Id.*

121. *See* discussion *infra* part II.C.5.

122. CAL. FAM. CODE § 3040(b) (West 1994). *See supra* text accompanying notes 13-15.

One explicit limitation, previously discussed,[123] prevents a parent's gender from serving as a basis for a custody determination; a judge's decision must be gender-neutral.[124] Another limitation requires that the court refrain from using a custody award or the denial of a requested modification as a basis or means by which to punish a parent for his or her misconduct, or to reward the unoffending parent.[125] Moreover, comparative income, or economic advantage or disparity, is not a permissible basis for a custody award.[126] Nor can the court make decisions based upon religion,[127] race,[128] sexual orientation,[129] or handicapped status.[130]

Finally, a trial judge should not base his or her custody determination on mere "disapproval of the morals and other characteristics of a parent that do not harm the child."[131]

C. *Factors Considered Influential by the Court in Resolving Move-Away Custody Cases*

In resolving move-away custody disputes, the trial court examines and evaluates a variety of factors. Once the requisite showing of a substantial change of circumstances[132] has been met, the court will shift its focus to a context-based analysis of all permissible and relevant factors surrounding

123. *See* discussion *supra* part II.B.1.a.

124. CAL. FAM. CODE § 3040(a)(1) (West 1994). Section 3040(a)(1) provides: "In making an order for custody to either parent, the court . . . shall not prefer a parent as custodian because of that parent's sex." *Id.*

125. *In re* Marriage of Stoker, 135 Cal. Rptr. 616, 618 (Ct. App. 1977).

126. Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986) (finding the trial court's reliance upon the relative economic positions of the parties was impermissible). This limitation, however, is frequently overlooked and economic issues currently play a significant role in custody determinations. *See infra* note 196. *See also* discussion *infra* part II.C.5.

127. *In re* Marriage of Murga, 163 Cal. Rptr. 79, 81-82 (Ct. App. 1980); *In re* Marriage of Urband, 137 Cal. Rptr. 433, 433 (Ct. App. 1977).

128. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

129. Nadler v. Super. Ct., 63 Cal. Rptr. 352, 354 (Ct. App. 1967).

130. *In re* Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979). A court cannot make a determination that one parent is not the "better" parent because that parent is handicapped or is physically unable to participate in physical activities and outings with his or her child. In *Carney*, the court held that the father's confinement to a wheelchair did not mean that he was not the better parent. *Id.* at 42-43. The court asserted that the "essence of parenting" was not defined by the physical activities a parent could engage in with his or her child, but rather the "ethical, emotional and intellectual guidance the parent gives to the child throughout his formative years, and often beyond." *Id.* at 43.

131. 33 CAL. JUR. 3D *Family Law* § 914 (1994).

132. *See* discussion *supra* part II.B.1.b.

the dispute, and the arguments in favor of and against the proposed relocation.[133]

Although the factors the court will consider are highly particularized since they are drawn from each dispute as it comes before the court, a series of influential and typical considerations can be garnered from recent case law. This comment focuses on significant considerations as identified by recent California cases.[134] While the following description of the court's primary considerations is not exhaustive, this comment highlights current critical considerations California family law courts typically examine.

1. *Policy Considerations*

The resolution of move-away custody disputes necessitates a multi-factor analysis, guided by the need to determine the most suitable outcome that, first and foremost, promotes the best interests of the child involved, and secondly, gives deference to issues of parental and personal autonomy.[135] In determining an outcome that is sensitive to these competing interests,[136] the trial court's decision is necessarily controlled by important public policy principles. Specifically, public policy dictates that the court's primary consideration is the child's best interests, a principle encompassing the child's safety, health and welfare.[137] Hence, if a proposed relocation is not in the child's best interests, the court is vested with the

133. California Family Code section 3040(b) grants the trial court judge "the widest discretion" in determining the most suitable parenting plan in a given situation. CAL. FAM. CODE § 3040(b) (West 1994). This wide latitude of discretion necessarily indicates that the judge is permitted to consider all permissible and relevant factors in each case. Furthermore, in making custody determinations, the court is instructed to consider certain policy principles, "among *any other factors* it finds *relevant*." *Id.* § 3011 (emphasis added).

134. To review this issue from the standpoint of each of the other forty-nine states is beyond the scope of this comment. For general insight into the approaches employed by other states in move-away custody disputes, see generally Debra E. Wax, Annotation, *Interference by Custodian of Child with Noncustodial Parent's Visitation Rights as Ground for Change of Custody*, 28 A.L.R. 4th 9 (1984 & Supp. 1993); *see also* Mandy S. Cohen, Note, *A Toss of the Dice . . . The Gamble with Post-Divorce Relocation Laws*, 18 HOFSTRA L. REV. 127 (1989); Surace, *supra* note 7.

135. *See* discussion *infra* part II.B.2.

136. *See* discussion *infra* part II.B.2.

137. CAL. FAM. CODE § 3011(a) (West 1994).

discretion and power to restrict the move by refusing to modify the existing custody decree.[138]

2. *Parental Roles and Relationships*

If the court considers both parents to be suitable parents,[139] the court will commence its context-based analysis of the circumstances and facts surrounding a move-away custody dispute in order to arrive at a proper solution. As evident in recent California cases, one critical and paramount factor frequently considered is the "nature and amount of contact"[140] and emotional bonds between each parent and the child following marital dissolution.[141] In regards to the "nature" of the contact between the parent and child, the court will look to the "ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years."[142] The court will evaluate the role of the parent,[143] both in terms of quality and quantity of contact, and the relationship between the parent and child, with a focus on the emotional bonds therein.

In *Burchard v. Garay*,[144] the court maintained that "existing emotional bonds between parent and child are the first consideration in any best-interests determination."[145] There, the trial court's modification of the custody arrangement

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138. In *In re* Marriage of Carlson, 280 Cal. Rptr. 840 (Ct. App. 1991), the court denied the move stating, "[t]here was no evidence that the best interests of the children would be promoted by the move to Pennsylvania" from California. *Id.* at 845.

139. *See infra* text accompanying notes 159-61.

140. Pursuant to California Family Code section 3011(c), the nature and amount of contact between the parent and child is a consideration the court must address in making a determination of the best interests of the child.

141. Burchard v. Garay, 724 P.2d 486, 492 (Cal. 1986); *In re* Marriage of Carney, 598 P.2d 36, 44 (Cal. 1979); *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 354-56 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); *Carlson*, 280 Cal. Rptr. at 844-45.

142. *Carney*, 598 P.2d at 43.

143. The court in *In re* Marriage of Rosson, 224 Cal. Rptr. 250 (Ct. App. 1986), looked to the father's assumption of "parenting responsibilities" in terms of his role and participation in the children's "academic, athletic, social, and religious activities." *Id.* at 254.

144. 724 P.2d 486 (Cal. 1986). Although this case did not present a move-away dilemma, it remains significant in that it demonstrates the importance of emotional bonds in a custody determination.

145. *Id.* at 494.

which awarded custody to the child's natural father was reversed as an abuse of discretion since the mother had been the "primary caretaker" for their son from his birth until the trial.[146] Moreover, there was no serious deficiency in the mother's care, and the child had become a "happy, healthy, and well-adjusted boy" as a result of her supervision and contact.[147] The court's ultimate determination in this instance was therefore based largely on the fact that not only was the mother a capable parent, but her relationship with her son was both secure and positive.[148] Hence, it appears that these factors, coupled with California's strong policy in favor of fostering "stability and continuity"[149] in a child's upbringing, prevailed in *Burchard* as the determinative considerations.

Another instance of the significance of parental roles and relationships is exemplified by the case *In re Marriage of Roe*.[150] In *Roe*, the court found the proposed relocation to be in the best interests of the child and granted the mother's request to modify the custody order allowing her to move to Alabama with her child and her new husband.[151] As in *Burchard*, the court in *Roe* relied upon evidence that the mother served as the son's "primary caretaker" and that he had developed a "close and bonded relationship with her 'such that it would be in his best interest to maintain that relationship and it would be to his detriment not to do so.' "[152] Furthermore, the mother testified as to her involvement in her son's education, and the fact that she had "sought the help of a therapist in order to blend [her new husband's] family and hers into a single family."[153] In addition, the therapist with whom the mother had consulted offered testimony that the mother "was able to give clear direction" to the son, and that she was "affectionate with him and they conversed easily."[154]

In contrast to this nurturing and positive relationship between the mother and her son, the son's relationship with

146. *Id.* at 491-92.
147. *Id.* at 487.
148. *Id.*
149. Burchard v. Garay, 724 P.2d 486, 491 n.6 (Cal. 1986).
150. 20 Cal. Rptr. 2d 352 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993).
151. *Id.* at 354.
152. *Id.* (citations omitted).
153. *Id.* at 356.
154. *Id.*

his father was characterized by emotional negativity. The court found that because of the father's "continuing anger" toward his ex-spouse, "he would be much less likely to support and encourage [the son's] frequent and continuing contact" with his mother.[155] Moreover, the father was characterized as "rigid and unbending," displaying "vindictiveness and animosity."[156] As such, the mother's parenting skills and emotional capabilities were found to be "far superior" to those of the father.[157]

Consequently, the court modified the original custody award in *Roe* to permit the mother to move to Alabama while retaining primary custody of the minor son.[158] Therefore, it appears that the court's principal consideration in determining whether the move was in the best interests of the child was the constructive nature of the contact between the mother and son, in contrast to the antagonistic attitude of the father.

3. *Examining the Child's Community Ties*

The court in move-away custody cases will also examine a child's ties to his or her community and speculate as to the effects of relocation. A critical issue in this examination is whether a proposed move will benefit the child or, instead, create excessive instability and chaos.

In re Marriage of Rosson[159] reflects this type of analysis; the *Rosson* court maintained that when a move-away custody dispute must be decided in the courtroom, "the judge must consider . . . the effect of the move upon the children when an equally capable and involved parent remains in the community and offers the children the opportunity to remain where they have lived almost all of their lives."[160] This passage demonstrates that the court's preliminary examination should focus on whether each parent is "capable,"[161] followed

155. *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 354 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993).

156. *Id.* at 354.

157. *Id.*

158. *Id.* at 353.

159. 224 Cal. Rptr. 250 (Ct. App. 1986).

160. *Id.* at 259.

161. *Id.*

by an evaluation of the nature and amount of contact between each parent and the child. The focus then turns upon the child as a separate consideration from that of the parents.

In re Marriage of McGinnis[162] reaffirmed the *Rosson* court's analytical process by clarifying the notion that the child's interests and needs are critical.[163] In *McGinnis*, the court considered the ties the three minor children had established in their community.[164] The court referred to the children's community "ties" in terms of "neighborhood friends, school, sports activities, dentists, medical doctors, teachers, etc."[165] A critical factor in the court's decision to deny modification of the custody order was the court's determination that the children had significant ties to their current home base.[166]

Implicit in the examination of a child's ties to his or her community is the assumption that such ties, if they exist, should not be severed if doing so would be adverse to the best interests of the child. As shown in *Burchard v. Garay*,[167] if the current custody arrangement is workable, uprooting children from the community to which they are accustomed is typically not in their best interests. This notion is illustrated by the *Burchard* court's statement: "We have frequently stressed . . . the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds."[168] Thus, in the interest of stability and continuity, workable custody arrangements are often protected and left intact.[169]

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162. 9 Cal. Rptr. 2d 182 (Ct. App. 1992).

163. *Id.* at 186-87.

164. In *In re* McGinnis, 9 Cal. Rptr. 2d 182 (Ct. App. 1992), the mother filed a motion for change of custody, seeking sole physical custody to enable her to relocate with her three minor children from Santa Barbara to Arcadia where her new husband retained employment. *Id.* at 184. Ultimately, the trial court's granting of the mother's request was reversed on appeal; the proposed relocation was not deemed imperative. *Id.*

165. *Id.* at 186.

166. *Id.* However, it remains necessary to acknowledge that other factors such as the public policy interests in maintaining stable custody arrangements and preserving contact between both parents contributed to this final outcome. *Id.* at 185-86.

167. 724 P.2d 486 (Cal. 1986).

168. *Id.* at 493.

169. *See In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 184 n.2 (Ct. App. 1992) (refusing to modify the custody order to allow the mother to relocate with the children, in light of the "working shared parenting arrangement" and the

4. *Frequent and Continuing Contact & Visitation Rights*

Another critical factor the court will consider when determining whether a desired move should be permitted is the probable effects the desired move will have upon the noncustodial parent's visitation rights. Two primary issues are present in this consideration. First, it is in the child's best interests for the court to foster and preserve frequent and continuing contact between the child and both parents following marital dissolution.[170] Such contact creates the "emotional bonds" the court in *Burchard* stressed as vital and necessary to the child's development.[171] Visitation rights play an especially important role between the child and the noncustodial parent as the visitation arrangement may be the only opportunity for the child and the parent to bond.[172] The distance created by the relocation may interfere with the noncustodial parent's ability to exercise visitation rights because of increased travel expenses and inconvenience, resulting in detriment to the child.[173] With these concerns in mind, the trial court judge must determine whether the possible frustration of visitation rights will, over time, counteract the best interests of the child. Often, this consideration necessitates the balancing of competing interests.[174] The judge must speculate as to the likely consequences of the move and bal-

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father's "recent purchase of the family home to provide for continuity for the children").

170. CAL. FAM. CODE § 3020 (West 1994). *See supra* text accompanying notes 51-54.

171. *Burchard*, 724 P.2d 486 at 494 ("[E]xisting emotional bonds between parent and child are the first consideration in any best-interests determination."). *See also In re* Marriage of Murga, 163 Cal. Rptr. 79, 80 (Ct. App. 1980) ("Continued contact with the noncustodial parent is vitally important to the welfare of a child.").

172. *See In re* Marriage of Carlson, 280 Cal. Rptr. 840, 843 (Ct. App. 1991). The court in *Carlson* stated:

> [T]hat . . . lack of contact between the minor children and Petitioner/Father for such a length of time is not a healthy environment for the minor child to be raised in and would result in substantial harm to them given the close relationship between the minor children and the . . . Petitioner/Father.

Id.

173. *McGinnis*, 9 Cal. Rptr. 2d at 184 n.2 ("A custody decision allowing a parent to remove the children out of the county is bound to interfere with the remaining parent's ability to have frequent and continuing contact with his or her children.").

174. *See* discussion *supra* part II.B.2.

ance its probable benefits with the harm that will be caused by not fostering frequent and continuing contact between the child and the noncustodial parent.

The second issue concerns the role of the noncustodial parent's visitation rights.[175] Pursuant to California Family Code section 3100,[176] visitation rights are a *right* of the parent. Section 3100 provides that "the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child."[177] Consequently, permitting the custodial parent to relocate may infringe upon the noncustodial parent's rights if the move seriously interferes with the exercise of visitation rights.

However, infringement of visitation rights—even if the interference is serious—is generally not sufficient to warrant the restriction of relocation.[178] It is necessary to note that the court makes a sharp distinction between *incidental* interference of visitation rights, and the specific *intent* of the move-away parent to affirmatively frustrate such rights.[179] Incidental interference, so long as it appears unintended, is

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175. *See* 33 CAL. JUR. 3D *Family Law* § 939 (1994). In making a joint custody order:

> [T]he court must grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. The court has the discretion to grant reasonable visitation rights to any other person having an interest in the welfare of the child.
>
> The parent's right to visitation is consonant with the public policy, stated in the Family Code, of assuring children of frequent and continuing contact with both parents.

Id. (citations omitted).

176. CAL. FAM. CODE § 3100 (West 1994).

177. *Id.*

178. "That the child's removal from the state practically deprives the father of his visitation rights is 'generally' insufficient to justify restraint on the mother's free movement." *In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 263 (Ct. App. 1976) (citation omitted).

179. The following guideline suggests how the effect of frustration of visitation rights resulting from relocation may be treated:

> [S]ince the stated policy of the custody laws is to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage so as to preserve the child's relationship with both parents, the court must take into account a noncustodial parent's ability to exercise visitation after the move when evaluating the best interests of a child. Thus, if the specific motive for removal of the child from the state is frustration of the other parent's visitation rights and is unrelated to the child's welfare, permission to remove the child will be denied.

permissible and will not in itself warrant the denial of modification of the existing custody order.[180] Intended frustration of visitation rights, however, has serious implications and may persuade the court to restrict relocation.[181] This result is likely because affirmative interference with the noncustodial parent's visitation rights is typically considered a bad faith motive or tactic, and as such, is likely to influence the court in determining that relocation would not serve the best interests of the child.

The extent and impact of the frustration is the focus of the court's consideration in determining the overall effects of a contemplated move on the noncustodial parent's visitation rights.[182] *In re Marriage of Ciganovich*[183] sets forth the general rule: "[A] parent having general custody is entitled to change residence unless the move is detrimental to the child. That the child's removal from the state practically deprives the father of his visitation rights is 'generally' insufficient to justify restraint on the mother's free movement."[184] This general rule, however, does not govern situations where the moving parent "acts with an intent to frustrate or destroy the [noncustodial parent's] visitation right."[185]

The application of this rule is apparent in *Ciganovich*, where the California Court of Appeal held that the trial court erred in failing to acknowledge the rule that removal of the child with the specific intent of frustrating visitation rights offends the best interests of the child, those of the noncustodial parent, and the policy of the court.[186] In *Ciganovich*, the mother was awarded custody of the minor children, while the father was granted weekend visitation rights.[187] The evidence revealed that the custodial mother engaged in a course

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33 CAL. JUR. 3D *Family Law* § 938 (1994) (citations omitted). *See also* 4 GODDARD, *supra* note 96, § 196.

180. *Ciganovich*, 132 Cal. Rptr. at 263.

181. *See* Gudelj v. Gudelj, 259 P.2d 656, 660 (Cal. 1953); *see generally* Evans v. Evans, 8 Cal. Rptr. 412, 416 (Ct. App. 1960).

182. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 842 (Ct. App. 1991) ("[A] noncustodial parent's loss of the practical ability to exercise visitation is relevant in deciding whether a custodial parent should be restrained from moving a child to a different geographical area.").

183. 132 Cal. Rptr. 261 (Ct. App. 1976).

184. *Id.* at 263 (citation omitted).

185. *Id.* (citation omitted).

186. *Id.* at 264.

187. *Id.* at 262.

of conduct aimed at avoiding her ex-spouse and preventing him from exercising his visitation rights.[188] Moreover, there was no evidence that the mother had any legitimate reason for the relocation. The court stated: "In this case there is not the slightest doubt as to the mother's motivation. She went to Reno, had no job or other preexisting reason for going there . . . . Her entire course of conduct was one of concealment of the children."[189] Thus, incidental frustration of the noncustodial parent's visitation rights is generally overlooked, while intended interference will likely result in a restriction of the moving party's relocation.

Similarly, the court in *In re Marriage of Fingert*[190] held: "Appellate decisions in California that have approved restrictions upon a custodial parent's choice of domicile have arisen only where the parent moving does so with an intent to frustrate or destroy the other parent's custody or visitation rights."[191] Thus, it is evident that intentional frustration of visitation rights can serve as a powerful factor in favor of restraining the move-away parent's relocation attempts. The focus in such cases, therefore, is on the state of mind of the moving parent, rather than the outcome of the move itself.

5. *Relocation Prompted by Economic Factors*

The court will also look to the move-away parent's primary justification for a desired move.[192] While the move-away parent may allege that the move is in the best interests of the child for educational, housing, or health-related reasons, the parent frequently mentions economic factors as an overriding justification. More specifically, the custodial parent may wish to move in order to accept or seek a job after a period of unemployment, to accept or seek out a better employment position,[193] or to accommodate a new spouse in

188. *In re* Marriage of Cignavoich, 132 Cal. Rptr. 261, 264 (Ct. App. 1976).

189. *Id.* Following the mother's removal of the children from the state and her use of a blind address to conceal their whereabouts, the trial court's decision to deny the father's request for modification of the custody order to protect his rights was reversed and remanded. *Id.* at 261.

190. 271 Cal. Rptr. 389 (Ct. App. 1990).

191. *Id.* at 392.

192. *See, e.g., In re* Marriage of Rosson, 224 Cal. Rptr. 250, 253 (Ct. App. 1986) (looking at the moving parent's "legitimate job- related reasons" for her proposed move).

193. *See Fingert*, 271 Cal. Rptr. at 390; *Rosson*, 224 Cal. Rptr. at 254.

similar circumstances.[194] In *Roe*, for example, the custodial mother explained: "My husband has decided to accept this employment rather than remain unemployed since the lack of additional finances materially affects our standard of living . . . ."[195] Generally, the court will listen to these good faith reasons, primarily because employment translates into increased income, which in turn directly affects a child's welfare.[196] Thus, if the move-away parent can connect the desired relocation to an improvement in employment status that is not merely speculative, the court may be more inclined to permit the move because such an improvement will ultimately benefit the child's standard of living and welfare.[197]

In addition, the court in *Rosson* maintained that "a parent must give serious consideration to moves which are best for career advancement, since careers continue long past the minority of children and are important for the financial and psychological well-being of the parent."[198] Such moves are not only relevant to the child's welfare, but are intrinsically

194. *See, e.g., In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 353 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 184 (Ct. App. 1992).

195. *Roe*, 20 Cal. Rptr. 2d at 353.

196. *Id.* It is important to note here that consideration of these economic factors appears to be contradictory to the holding in Burchard v. Garay, 724 P.2d 486 (Cal. 1986), in which the California Supreme Court held that comparative income or economic disparity is not a permissible basis for determining custody. *Id.* at 493. It is apparent that the limitations set forth in *Burchard* are not consistently followed. An examination of move-away custody cases reveals that economic concerns and income are factors the court frequently considers quite seriously. *See* discussion *infra* part II.C.5. One parent's higher income typically translates into more discretionary income that can be used for a child's benefit. Money is needed for food, suitable housing, clothing, health care, educational purposes, extracurricular activities, etc. These factors are routinely addressed by the trial courts; therefore, money is necessarily an important issue. *See* discussion *infra* part II.C.5. Consequently, the limitations posed by the *Burchard* holding are not absolute and are often overlooked.

197. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 253 (Ct. App. 1986). This view of relocation for legitimate employment reasons is an influential justification for permitting the desired move as shown by the court's holding in *Rosson*. There, the court held, "where a parent providing the primary residence for children decides, for legitimate job-related reasons, to move . . . this can be found to constitute a persuasive showing of changed circumstances affecting the children justifying modification of a custody order." *Id.*

198. *Id.* at 259. The court in *Rosson* further stated that the child's preference should be assigned a greater role in modification proceedings than in initial custody determinations. *Id.* at 257. In this case, the ten- and thirteen-year

linked to the move-away parent's continuing financial position,[199] as well as the parent's psychological well-being and respect in the employment community.

6. *Assigning Believability to the Child's Preferences*

When appropriate, the court will consider the child's preferences regarding relocation.[200] It is statutorily required that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof."[201]

As demonstrated in *Rosson*, in determining whether the child is capable of expressing a helpful preference, the court's focus is not as much upon the child's age as the child's maturity level. The *Rosson* court found that "[m]aturity is not measured by chronological age,"[202] and based its determination upon factors such as "sincerity," "bearing," and "degree of maturity."[203] Typically, with children between the ages of ten and thirteen, one of the trial court's functions is to determine the validity of their expressed preferences, if possible.[204]

In *Rosson*, the court used an in-chambers procedure because it avoided "to the greatest extent possible placing the children in a position of having to choose between their parents."[205] While asking a child what she or he prefers would ostensibly be the most straightforward method by which to identify the arrangement the child is most comfortable with, this approach is not always the most effective. Even if the child is deemed of sufficient maturity to express a valid preference, the child may fear giving his or her choice because doing so might anger the parent not selected. Moreover, the child's expressed preference may be tainted if it is motivated by feelings of guilt, anger or resentment toward one parent, or by the fear of beginning life in a new environment. Furthermore, the child may choose not to express a preference

old children met the statutory measure, which was determined from the children's testimony given in the judge's chambers. *Id.* at 254.

199. *See supra* note 196.

200. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 256 (Ct. App. 1986).

201. CAL. FAM. CODE § 3042 (West 1994).

202. *Rosson*, 224 Cal. Rptr. at 256.

203. *Id.*

204. *Id.*

205. *Id.* at 255 n.5.

because she or he does not want to choose sides or dreads the repercussions of doing so.[206]

Thus, while it is statutorily required that the child's preference be given weight if she or he is of sufficient maturity to express a valid choice, and while it would be helpful for the court to have such information available in making its determination, the court cannot routinely expect accurate information. Too many potential interferences could either prevent the child from interjecting his or her preferences, or taint the truthfulness of such statements.[207]

7. *Taking into Consideration the Expense, Inconvenience, and Distance of Travel*

Travel expenses incurred by relocation are often among the factors considered.[208] A proposed move which increases the distance between the custodial and noncustodial parents generally increases travel costs, time and inconvenience of travel.

With respect to travel expenses, the court typically focuses on whether the resulting increase in costs caused by relocation will prevent the noncustodial parent from exercising his visitation rights.[209] As some increase in travel expenses is to be expected, an increase in expenses is not sufficient by itself to warrant denial of a desired move. The court's focus appears to be on the magnitude of the increase.

The court's primary concern, as illustrated in *Ciganovich*, reveals that "[r]egardless of the mother's good or ill motives, the father's inability to spend time and money on

206. Bulow & Gellman, *supra* note 13, at 956.

207. Even though the children's expressed preferences in *Rosson* proved to be one of the most critical and determinative factors in the case's outcome, this degree of persuasiveness is not frequent. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 255 (Ct. App. 1986).

208. *See generally In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 358 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993) (holding that the parties were sufficiently affluent to be able to afford the expense of transporting the child back and forth between Alabama and California); *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 843 (Ct. App. 1991) (holding that the parties did not have the financial capacity to ensure contact between the father and the children); *In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 263 (Ct. App. 1976) ("the father's inability to spend time and money on travel may effectively damage or destroy his legitimate paternal aspirations.").

209. *See* cases cited *supra* note 208.

travel may effectively damage or destroy his legitimate paternal aspirations."[210] Thus, if the distance created by the move renders visitation virtually impossible as a result of increased expenses and time-consuming travel, the court will consider this situation seriously. If visitation rights can no longer be exercised, the resulting lack of contact both counteracts the public policy of frequent and continual contact between the child and the noncustodial parent[211] and infringes upon the noncustodial parent's right to visit with the child.[212]

The court's concern with travel expenses is demonstrated in *In re Marriage of Carlson*,[213] where the custodial mother was not permitted to relocate to Pennsylvania from California with the couple's two minor children.[214] Although many factors were addressed by the trial court in arriving at this decision, travel expenses were cited as a significant consideration.[215] The court found that "both parents lacked the financial wherewithal to sustain a long-distance relationship between the children and their father of the substance they presently enjoyed."[216] This statement indicates that the court was concerned with the probable interference of the noncustodial parent's visitation rights, as well as disruption of the existing stable and workable custody arrangement that would ensue from the move.

Thus, while an increase in travel expenses and inconvenience alone may not compel the court to deny a proposed relocation, the court will consider such a factor in conjunction with other factors, as they may indirectly affect the child's best interests and welfare.

In addition to examining the expenses incurred by traveling, the court may take notice of the inconvenience caused by travel distance. First, an increase in travel distance may lead to an interference with the noncustodial parent's "practical ability"[217] to exercise visitation rights. The increased time required to travel will detract from the noncustodial parent's time available to spend with the children and is

210. *Ciganovich*, 132 Cal. Rptr. at 263.
211. CAL. FAM. CODE § 3020 (West 1994).
212. *Id.* § 3100.
213. 280 Cal. Rptr. 840 (Ct. App. 1991).
214. *Id.*
215. *Id.* at 845.
216. *Id.*
217. *Id.* at 842.

likely to produce greater inconvenience overall. The noncustodial parent may find that the increase in travel time created by the proposed relocation would result in less quality time to spend with his children. Second, the greater travel distance resulting from relocation will most likely increase travel expenses.[218]

In *Carlson*, for example, the trial court found the parents lacked the "financial wherewithal"[219] to preserve continuing visitation and that the decrease in contact between the father and the children would not be a "healthy environment for the minor children to be raised in."[220] The court concluded that "a noncustodial parent's loss of the practical ability to exercise visitation is relevant in deciding whether a custodial parent should be restrained from moving a child to a different geographical area."[221] Consequently, the mother's proposed relocation was denied.[222] Thus, when an increase in travel expenses and distance imposes undue hardship on the noncustodial parent, the court will list this factor as a reason for restricting a desired move.

8. *Striving Toward a "New Start" and the Problem with Speculative Justifications*

Finally, a reason frequently cited as justification for a proposed move is the custodial parent's desire to make a new start, or to begin a new life altogether after divorce. Often, relocation is viewed as integral to the achievement of this goal, as it may allow the mother to move near family,[223] seek employment or enable her new spouse to obtain work,[224] con-

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218. *See supra* notes 204-05 and accompanying text.

219. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 843 (Ct. App. 1991).

220. *Id.*

221. *Id.* at 842.

222. *Id.* In contrast, in *Rosson*, a case in which the proposed move was permitted, the fact that the move was a comparably short distance to that proposed in *Carlson* likely factored into the court's holding. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 254 (Ct. App. 1986). In *Rosson*, the custodial mother wished to move from Napa to San Francisco, an intrastate rather than interstate relocation, as was the situation in *Carlson*. *Id.* Similarly, the mother was permitted to relocate in *Fingert* where the proposed move was from Ventura County to San Mateo, also an intrastate transition. *In re* Marriage of Fingert, 271 Cal. Rptr. 389, 390 (Ct. App. 1990).

223. *See, e.g.*, *Carlson*, 280 Cal. Rptr. at 842.

224. *See, e.g.*, *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 353 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom.*, *In re* Marriage of Roe, 23

tinue her education,[225] or move somewhere that she will not be confronted with or be reminded of her ex-spouse.[226] For example, the custodial mother may desire to relocate for safety reasons, such as putting distance between herself and an abusive former husband.[227]

While the court will acknowledge and listen to the reasons listed above, their influence is limited. When considering these justifications, the court will insist that they not be overly speculative[228] and that they be sufficiently compelling.[229] As previously mentioned, relocation will most often not be permitted unless it is imperative, essential, or expedient.[230] Consequently, if the reasons behind a desired move are too speculative, they will fail to meet the required showing.

Carlson demonstrates both the problem with asserting speculative justifications for a desired move and the court's insistence that the reasons be sufficiently compelling. In *Carlson*, the mother wished to move with her children from California to Pennsylvania as "[s]he desired the emotional support of her parents, who could also help her care for the children while she attended college in Pennsylvania."[231] Furthermore, the "mother aspired to obtain a degree in counseling, a goal which would take six years to achieve."[232] Although the mother's reasons for the proposed move were legitimate and in good faith, the trial court did not find them sufficiently compelling.[233] The trial court concluded that the

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Cal. Rptr. 2d 295 (Ct. App. 1993); *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 184 (Ct. App. 1992); *Rosson*, 224 Cal. Rptr. at 254.

225. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 842 (Ct. App. 1991).

226. *See In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 262 (Ct. App. 1976).

227. *Id.*

228. The fact that speculative claims may limit the court's granting of custody modification can be inferred from *In re* Marriage of Rosson, 224 Cal. Rptr. 250 (Ct. App. 1986). In this case, the court permitted the custodial parent's desired relocation because the alleged change of circumstances was "not speculative." *Id.* at 259.

229. *Carlson*, 280 Cal. Rptr. at 843.

230. Burchard v. Garay, 724 P.2d 486, 489 (Cal. 1986); *In re* Marriage of Carney, 598 P.2d 36, 38 (Cal. 1979); *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 186 (Ct. App. 1992); Speelman v. Super. Ct., 199 Cal. Rptr. 784, 786 (Ct. App. 1983).

231. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 842 (Ct. App. 1991).

232. *Id.*

233. *Id.* at 843.

mother "can obtain the desired education in California and she has no compelling reason to go to Pennsylvania except for the emotional support she would derive from contact with her mother and father."[234] Consequently, the trial court determined that it was in the best interests of the children to restrict the move so that they could maintain close ties with both parents.[235] Thus, it appears from the court's holding in *Carlson* that the children's interests will be given priority consideration while the custodial parent's desire to be with his or her family for emotional support will be relegated to secondary importance.[236]

In addition, the court's opinion in *Rosson* suggests that if the move-away parent alleges that the move is for the purpose of seeking better employment, or for any other benefit not yet materialized, problems may surface as to the speculative nature of such assertions.[237] Although the court deemed the mother's reasons behind the proposed move "not speculative"[238] in that she had found "a new and better job in San Francisco,"[239] the fact that the court addressed this possibility indicates that it is an issue that will be considered. The court, therefore, may be skeptical if the move-away parent is speculating as to the possibility of seeking better employment as opposed to having a job offer available to accept, or even highly promising contacts.

9. *Constitutional Concerns Surrounding Move-Away Custody Disputes*

Finally, constitutional concerns are an essential consideration in the trial court's analysis and resolution of move-away custody disputes. The primary issue involved is whether denial of relocation, in the event that the requisite

234. *Id.*

235. *Id.*

236. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 843 (Ct. App. 1991). Had the mother asserted a more compelling reason to move to Pennsylvania, such as an actual job offer or scholarship to a university in that state, the outcome may have been different. The trial court, however, also found that the parties lacked the financial resources to maintain a long-distance relationship, and the relationship between the children and their father would be harmed if visitation could not be carried out. *Id.*

237. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 259 (Ct. App. 1986). *See also Carlson*, 280 Cal. Rptr. at 840.

238. *Rosson*, 224 Cal. Rptr. at 259.

239. *Id.* at 254.

showing of a substantial change of circumstances has been met,[240] is an infringement of an individual's constitutional rights of travel and mobility.

The right of travel has long been established as constitutionally protected.[241] In *Shapiro v. Thompson*,[242] the United States Supreme Court stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[243]

This acknowledgment was reaffirmed in *In re White*:[244] "[T]he right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society . . . ."[245]

Despite the express recognition of the constitutionally protected right to travel, judicial dissension exists as to the extent and role of constitutional issues in the context of move-away custody disputes. At one extreme, some courts reason that restricting a move by threatening to retract custody from the custodial parent if that parent decides to move is a flagrant violation of an individual's constitutional right to travel.[246] In *Fingert*, the court held:

> Courts cannot order individuals to move to and live in a community not of their choosing. To attempt to do so is inconsistent with both the federal and California Constitutions. The United States Supreme Court has inferred a

240. *See* discussion *supra* part II.B.1.b.

241. *See* Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1966); Blair W. Hoffman, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C. DAVIS L. REV. 181, 186 (1973). *See generally* Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625 (1985); Anne L. Spitzer, *Moving and Storage of Post-Divorce Children: Relocation, the Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1 (1985).

242. 394 U.S. 618 (1969).

243. *Id.* at 629.

244. 158 Cal. Rptr. 562 (Ct. App. 1979).

245. *Id.* at 567 (citation omitted). *See also* People v. Beach, 195 Cal. Rptr. 381, 386 (Ct. App. 1983) ("A citizen has a basic constitutional right to intrastate travel as well as interstate travel.").

246. *See In re* Marriage of Fingert, 271 Cal. Rptr. 389, 392 (Ct. App. 1990).

> right to travel from various constitutional provisions. This right also protects the right of individuals to "migrate, resettle, and find a new job."[247]

At the other end of the spectrum, some courts have held that constitutional rights are not violated if custody is taken away when the parent goes through with her desired move. The rationale behind this viewpoint is that the parent still remains free to travel and move regardless of whether custody is taken away. This viewpoint is demonstrated in *McGinnis*, where the court held that the "[m]other is free to travel inter- or intrastate. The issue is whether she can take the children with her . . . . A trial court's order denying her request to remove the children may 'chill' her constitutional right to travel, but only indirectly."[248]

This viewpoint makes a distinction as to the real issue present in these situations. Here, the issue posed by move-away custody cases is not whether a constitutional right to travel exists, but whether the move-away parent has a right to take her child with her if the move is realized.[249] By rephrasing the primary issue in this manner, the court is essentially avoiding the overriding constitutional problem by recharacterizing the issue as concerning an unrecognized right, that of traveling with one's child.

Under this framework, the "right" at issue is much less serious than the protected constitutional right to move and travel because any alleged right to move with one's child without jeopardizing custodial arrangements is not constitutionally protected. Hence, the so-called right to move with one's child, since it is not a protected constitutional right, is subject to the same overriding policy as all family law questions: the best interests of the child remains paramount to all other considerations.[250]

This viewpoint is illustrated by the court's reasoning in *Carlson*, where the court stated that even if denial of relocation by removal of custody poses a hindrance to travel, such interference is only indirect and is outweighed by considerations pertaining to the child's best interests.[251] The court

247. *Id.* at 392 (citation omitted).
248. *In re* Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 187 (Ct. App. 1982).
249. *Id.*
250. *See supra* text accompanying notes 51-54.
251. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 846 (Ct. App. 1991).

maintained that not permitting the mother to relocate "was not a direct restriction upon the mother, since it did not prevent her from leaving the state *without the children.*"[252] The court continued: "[a] serious argument can also be made that the state has a legitimate and necessary interest in the welfare of the child . . . ."[253] Hence, the court's interest in the child's welfare overshadows the indirect interference of the parent's right to travel and move.[254]

While constitutional issues remain a consideration in a judicial determination as to whether relocation should be permitted, it appears that, typically, they do not prevent a judge from making a ruling that effectively restricts relocation. The general rule, therefore, is that restricting relocation does not constitute an infringement of an individual's right to travel because even if relocation is not allowed the parent can still travel freely—as long as such travel is without the children.

III. ANALYSIS

A. *Multi-Factor Analysis: Looking at the Factors of Each Case as Interactive*

The unique factors of each move-away case generally work in combination to persuade a judge to permit or deny a proposed relocation. An examination of recent California move-away custody cases reveals that rarely, if at all, will one factor be determinative in resolving a dispute. Typically, a judge will look at the variety of factors and circumstances posed by each case. These factors can be perceived as pros and cons for permitting or denying a desired move. Consequently, while one or two factors may be more critical and therefore more influential than other factors, the final outcome is most likely attributable to the interplay of multiple factors.

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252. *Id.* at 846 (emphasis added).

253. *Id.*

254. *See In re* Marriage of Ciganovich, 132 Cal. Rptr. 261, 264 (Ct. App. 1976) ("The court referred to the mother's constitutional right of 'freedom of movement' but failed to recognize the well-established rule that removal of the children with the objective of frustrating visitation rights offends the court . . . .").

In *In re Marriage of Rosson*,[255] for example, one of the most critical factors was the child's strong preference against relocation.[256] However, this was not the only factor the court addressed in its decision to award the children's primary custody to the father following the mother's relocation. In addition to the persuasive testimony of the child,[257] the court also considered the nature and amount of contact between the children and both parents, as well as the children's ties to the community in which they were raised.[258] Both parents were deemed "excellent parents,"[259] which meant that regardless of whether the move was permitted, the children would reside with a suitable parent. Furthermore, common sense reveals that as the age of the children involved increases, so will the difficulty of adjustment to a new school and peer group.[260] The age of the children involved is a factor inherently linked to the degree of the children's entrenchment within their residential community.

In light of the children's preferences, their degree of maturity, and the fact that their academic, athletic, social, and religious activities remained in their current community,[261] the mother's interests were subsumed by the best interests of the children.[262] Even though the court in *Rosson* considered the mother's competing interests—the fact that she had a new and better job waiting for her in the area to which she wished to move[263]—the court opted to restrict the mother from relocating the children from Napa to San Francisco. Thus, it becomes evident that the outcome in *Rosson* was not determined by one isolated factor, but instead was a product of the interplay of the multiple factors and circumstances surrounding the particular dispute.

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255. 224 Cal. Rptr. 250 (Ct. App. 1986).

256. *Id.* at 255.

257. The child articulated that he wished to stay in Napa because he felt "comfortable" there and his "friends and [his] school" were in Napa. *Id.* The child had lived in Napa all his life and explained: "[M]oving to [San Francisco] would be like putting me in a cage." *Id.*

258. *Id.* at 259.

259. *Id.* at 255.

260. At the ages of 13 and 10, the children in *Rosson* were firmly rooted in their current location. *In re* Marriage of Rosson, 224 Cal. Rptr. 250, 254 (Ct. App. 1986).

261. *Id.*

262. *Id.* at 253.

263. *Id.* at 254.

Similarly, the court in *In re Marriage of Roe*[264] did not rely on one predominant factor in permitting the mother to relocate from California to Alabama. Specifically, the court looked to the mother's admirable role as an active parent, the father's continuing anger and animosity, and the fact that the purpose of the move was to enable the mother's new spouse to accept a job after a nine-month period of unemployment.[265] The court assessed the impact of the advantages and disadvantages of the relocation as a whole and made its ultimate decision with the goal of furthering the best interests of the child.

A final example of the court's tendency to examine a combination of significant factors, rather than each factor in a vacuum, is the move-away custody dispute presented in *In re Marriage of Carlson*.[266] In that case, the court considered the custodial mother's motives for the move from California to Pennsylvania—to be with her family and continue her education, the positive nature of the child's relationship with both parents, and the fact that the parents did not have sufficient financial resources to maintain a long-distance visitation arrangement.[267]

Thus, it is evident that during the complex process of resolving move-away custody disputes, a trial court judge will examine and evaluate all relevant factors as a combination of elements, not as isolated issues. The final determination is a product of the interaction of various factors, because these factors as a whole indicate whether the proposed relocation would be in the best interests of the child.

B. *Standard of Review*

As previously discussed, the circumstances surrounding each move-away custody dispute are vital to its final outcome.[268] In the case-by-case treatment of move-away disputes, the trial court judge is empowered to consider all relevant facts in making a custody determination with the

264. *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993).

265. *Id.* at 353.

266. 280 Cal. Rptr. 840 (Ct. App. 1991).

267. *Id.* at 843.

268. *See* discussion *supra* parts II.B.2, III.A.

"widest discretion."[269] As a result of this broad discretion, the standard of review for move-away custody cases favors protecting the trial judge's decision. The general rule states that "[t]he standards of appellate review of custody and visitation orders are settled. Reversal is justified only for abuse of discretion."[270]

The precise "test" the judge must adhere to in order to remain within the wide boundaries of his or her discretion is set forth in *Carlson*: "The reviewing court must consider all the evidence, draw all reasonable inferences, and resolve all evidentiary conflicts, in a light most favorable to the trial court's ruling."[271] The reviewing court determines whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child.[272] This test focuses on what the trier of fact "*could* conclude," as opposed to the deductions the judge *actually* made.[273] This suggests that a ruling of abuse of discretion is rare because speculation as to the reasoning behind the judge's decision is permissible.[274]

Thus, this standard of review indicates that the judge's wide discretion is virtually unfettered; so long as the judge considers the evidence before him or her in a rational manner, the custody decision will not be overturned for an abuse of discretion.

C. *Uncurbed Discretion: The Need for Legislation*

The fact that a family court judge's discretion is virtually unrestrained in the area of move-away custody disputes indi-

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269. CAL. FAM. CODE § 3040(b) (West 1994).

270. *Carlson*, 280 Cal. Rptr. at 845 (citation omitted). *See also* Gudelj v. Gudelj, 259 P.2d 656, 660 (Cal. 1953); Clarke v. Clarke, 217 P.2d 401, 402 (Cal. 1950); *In re* Marriage of Roe, 20 Cal. Rptr. 2d 352, 354 (Ct. App. 1993), *review granted and cause transferred sub nom. by In re* Marriage of Clinton H.R., 856 P.2d 1131 (Cal. 1993), *aff'd sub nom., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); *In re* Marriage of Birnbaum, 260 Cal. Rptr. 210, 216-17 (Ct. App. 1989).

271. *Carlson*, 280 Cal. Rptr. at 845 (citation omitted).

272. *Id.* (citation omitted). *See also Roe*, 20 Cal. Rptr. 2d at 352.

273. *In re* Marriage of Carlson, 280 Cal. Rptr. 840, 845 (Ct. App. 1991) (emphasis added).

274. The court in *Roe* set forth a discretionary test similar to that developed in *Carlson*, stating that whether a custody determination permitting relocation is in the best interests of the child is dependent upon whether the move was supported by evidence that would indicate the court rationally exercised its discretion. *Roe*, 20 Cal. Rptr. 2d at 355 (citation omitted).

cates a dire need for control and uniformity in the realm of judicial administration. Legislation is needed because the best-interests-of-the-child standard and the current case-by-case method by which to resolve move-away cases is too flexible and permissive.[275] With no framework to guide a judge in his or her custody decision, the outcome of such cases is highly unpredictable. Furthermore, by virtue of the fact that judges are given the "widest discretion"[276] in making custody determinations, there exists too much leeway for individual bias and value judgments.[277]

Thus, there is a pressing need for a substantive legislative framework to direct judges in resolving move-away cases in a predictable, uniform, and consistent manner which will produce equitable results. This is crucial not only to protect the parties involved in such cases, but also to promote judicial economy. Furthermore, legislation to guide judges in the resolution of move-away dilemmas will further guarantee the implementation of important policy objectives, such as promoting the best interests of the child.[278]

While each move-away case is unique, a flexible legislative framework would allow the court to consider each case's individual attributes. Legislation need not be so rigid that it

275. Recently, California Senator Diane E. Watson authored Senate Bill 1350, last amended in Senate on March 21, 1994, designed to replace Senate Bill 1159 (1993) which died in committee. Senate Bill 1350 ("SB 1350") was sent to interim study in August, 1994. Support for Watson's legislative proposal has not yet reached its full potential, however, as SB 1350 died in committee. A new proposal may be introduced in 1995.

Senate Bill 1350 was designed to amend sections 3004, 3020, 3024, 3040, and 3086 of the California Family Code. According to the Legislative Counsel's Digest addressing SB 1350, this bill "would provide that a desire on the part of either parent to relocate shall not by itself constitute a sufficient basis for an initial decision to award or allocate custody, nor for a change in custody." S. 1350, 103rd Cong., 2d Sess. (1994). Senate Bill 1350 granted the custodial parent the right to determine the child's residence and shifted the court's focus from "frequent" contact to "regular" contact. In essence, SB 1350 modernizes and restates California Family Code section 7501 which empowers the custodial parent to relocate more freely than is permitted today. *See also infra* note 278 and accompanying text.

276. CAL. FAM. CODE § 3040(b) (West 1994).

277. *See supra* note 16.

278. Senate Bill 1350 was designed to achieve these objectives and functioned to shift the burden of proof onto the parent opposing relocation. More specifically, SB 1350 would have provided "that the noncustodial parent bears the burden of proving a proposed change of residence is 1) being undertaken to frustrate the noncustodial parent's visitation rights or 2) is not in the best interests of the child." ROBERTI, *supra* note 3, at 7.

cannot account for the distinctiveness of each case. Instead, this comment suggests a legislative framework that focuses on addressing the unique characteristics of each case rather than ignoring them and still provides guidelines that will promote predictability and uniformity.

The premise of this comment's proposal is that legislation in the area of move-away custody cases should provide the court with guidelines for equitable resolution and protect the parties' interests, rather than rigid statutory principles aimed at merely processing these cases in the interest of judicial economy. The benefit of flexible legislative guidelines is that such legislation would focus judicial determination on resolutions that remain cognizant of the parties and unique circumstances each move-away case entails and away from unpredictability and personal value judgments.

The flexible framework proposed in this comment is based on the approach utilized in California Family Code section 4320, which guides the determination of spousal support.[279] The framework of section 4320 is ideal in that it lists a series of ten factors the court shall consider in making a spousal support award. By providing ten factors the court must evaluate, section 4320 guides the court's focus, yet allows for the judge to determine the strength of each factor and the role it should play. The tenth factor is a "catch-all" provision in that it allows the court to consider "[a]ny other factors it deems just and equitable."[280] This catch-all provision is important in that it allows any relevant factor or factors not included in the list of typical factors to be considered if doing so would be necessary for an equitable decision.

Therefore, the structure of California Family Code section 4320 is incorporated into this comment's legislative proposal because it provides a list of factors the court shall consider, yet remains flexible enough to allow for any unique and unanticipated circumstances.

IV. PROPOSAL: SUGGESTED LEGISLATION FOR MOVE-AWAY CUSTODY DISPUTES

The proposed legislative framework provides a set of rudimentary guidelines to assist the court in resolving move-

279. CAL. FAM. CODE § 4320 (West 1994).
280. *Id.* § 4320(j).

away custody disputes in a uniform, predictable, and flexible manner:

(A) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where that contact would not be in the best interest of the child.[281]

In any proceeding where the custody of a minor child in a relocation dispute is at issue, during the pendency of the proceeding or at any time thereafter, the court shall make such order for the custody of the child as may seem necessary and proper.

(B) In making an award of custody or modifying visitation rights in any relocation dispute, the court shall consider all of the following needs and circumstances of the child or children involved:

(1) The best interest of the child, taking into account all of the following:[282]

(a) The health, safety, and welfare of the child.[283]

(b) Any history of abuse by one parent against the child or against the other parent.[284]

(c) The nature and amount of contact with both parents prior to relocation.[285]

(2) If a child is of sufficient maturity and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of

281. This language is drawn directly from California Family Code section 3020. The role of this language in this legislative proposal is to ensure that the public policy considerations of the best interests of the child are implemented and protected.

282. These considerations correspond directly to the section of this comment dealing with policy considerations. *See* discussion *supra* parts II.B.1, II.C.2.

283. This language is drawn directly from California Family Code section 3011(a).

284. This language is drawn directly from California Family Code section 3011(b). For the purposes of this comment and in the interest of brevity, additional language in this section has been left out.

285. These considerations correspond to the section of this comment dealing with parental roles and relationships. *See* discussion *supra* part II.C.2.

the child in making an award of custody or modification thereof in a relocation dispute.[286]

(3) The extent to which the child is attached to or involved in his or her community surroundings, in light of academic, extracurricular, social, athletic, religious, or other activities.[287]

(C) In making an award of custody in any relocation dispute, the court shall also consider all of the following circumstances of the respective parties:

(1) The alleged needs or justifications offered by the move-away custodial parent in support of the desired relocation.

(2) The extent to which the custodial parent's desired relocation is prompted by, or based upon, economic factors, such as, but not limited to, employment opportunities, housing, education, and the cost of living.[288]

(3) The noncustodial parent's right to and interest in exercising granted visitation rights, as well as the cost, distance and inconvenience of travel that would ensue from relocation.[289]

(4) Any other factors which it deems just and equitable[290] and related to the best interests of the child.

V. CONCLUSION

The current case-by-case treatment of move-away custody disputes in California reveals the dire need for legislative control.[291] With travel and relocation becoming easier and more common than in the past and with more women engaged in the work force, move-away custody cases will inevitably become an even more pressing and prevalent problem. Consequently, in the interests of lending guidance and clarity to the judicial resolution of move-away custody dis-

286. This language is based on California Family Code section 3020. *See* discussion *supra* part II.C.6.

287. These considerations correspond to the section of this comment examining the significance of the child's community ties. *See* discussion *supra* part II.C.3.

288. *See* discussion *supra* part II.C.5.

289. This provision is based on the issues presented in the sections that address visitation rights. *See* discussion *supra* parts II.C.4, 7.

290. This "catch-all" provision is drawn from California Family Code section 4320(a)(10).

291. *See supra* note 275.

putes and of keeping judicial discretion in check, it is necessary that legislation be developed to guide the resolution of move-away dilemmas.

Although this subject matter remains difficult to legislate in that each dispute is unique and highly individualized, this comment suggests a way in which legislation can achieve the desired result without overlooking the characteristics of each dispute. The factors the court typically examines in move-away cases have been synthesized in this proposal to provide a flexible framework of guidelines the court should consider when resolving such disputes. As a result, the proposal suggests a way in which to reform case-by-case analysis into a controllable process that acknowledges the varying interests and needs of the parties involved and furthers the public policy goal of promoting the best interests of the child, while striving for judicial economy and uniformity.

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